UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

DANCO, INC. AND BENJAMIN J. GUILIANI,	)	
Plaintiffs	)	
v.	)	Civ. No. 97-54-B
WAL-MART STORES, INC.,	)	
Defendant	)	

ORDER AND MEMORANDUM OF DECISION

BRODY, District Judge

On April 29, 1998, the Court entered judgment on a jury verdict awarding Plaintiffs, Danco, Inc. and Benjamin J. Guiliani (collectively, "Plaintiff"), $654,440 in compensatory damages. The jury found that Defendant, Wal-Mart Stores, Inc., violated Plaintiff's civil rights by subjecting him to a hostile work environment in violation of 42 U.S.C. § 1981, and breached a written contract between Plaintiff and the Augusta Sam's Club. Pursuant to Fed. R. Civ. P. 50(b) and 59(a), Defendant moves the Court for Judgment as a Matter of Law or, in the alternative, for a New Trial. A hearing on Defendant's Motion was held on June 29, 1998. For the reasons set forth below, the Court rejects each of Defendant's arguments in support of its motion, except for Defendant's claim that the jury's award of damages on Plaintiff's civil rights claim is excessive. Upon consideration of the evidence presented at trial and the arguments presented by the parties in connection with this issue, the Court is persuaded that remittitur is warranted.

I. STANDARD OF REVIEW

On a Fed. R. Civ. P. 50(b) motion for judgment as a matter of law, the Court "'examine[s] the evidence and the inferences reasonably to be drawn therefrom in the light most favorable to the nonmovant.'" Colasanto v. Life Insurance Co. of North America, 100 F.3d 203, 208 (1st Cir. 1996) (quoting Wagenmann v. Adams, 829 F.2d 196, 200 (1st Cir. 1987)). The Court will override a jury verdict only if the evidence "'is so one-sided that the movant is plainly entitled to judgment, for reasonable minds could not differ as to the outcome.'" Id. (quoting Gibson v. City of Cranston, 37 F.3d 731, 735 (1st Cir. 1994)).

Pursuant to Fed. R. Civ. P. 59(a), the Court may order a new trial and set aside a verdict "when the verdict is against the clear weight of the evidence, or is based upon evidence which is false, or will result in a clear miscarriage of justice.'" Ahern v. Scholz, 85 F.3d 774, 780 (1st Cir. 1996) (citations omitted). "'[T]he district court has broad legal authority to determine whether or not a jury's verdict is against the "clear weight of the evidence."'" Id. (quoting de Perez v. Hospital del Maestro, 910 F.2d 1004, 1006 (1st Cir. 1990)). The district court, however, "'cannot displace a jury's verdict merely because he disagrees with it or would have found otherwise in a bench trial.'" Id. (quoting Milone v. Moceri Family, Inc., 847 F.2d 35, 37 (1st Cir. 1988)).

II. DISCUSSION

Defendant asserts four arguments in favor of its Motion for Judgment as a Matter of Law or, in the alternative, for a New Trial. The Court addresses each in turn.

A. An Independent Contractor May Not Bring a Hostile Work Environment Claim Pursuant to 42 U.S.C. § 1981.

Defendant reiterates its argument, raised during the course of trial, that Plaintiff, as an independent contractor, is precluded from claiming that Defendant violated 42 U.S.C. § 1981 ("§ 1981") by creating a hostile work environment. Defendant contends that the hostile work environment theory was crafted under Title VII as a method of proving racial discrimination, and is limited in its application to the employer/employee relationship.

The parties have not cited, and the Court's research does not disclose, any authority directly addressing this issue. In Wright v. State Farm Mutual Automobile Insurance Co., 911 F. Supp. 1364, 1376 (D. Kan. 1995), aff'd, 94 F.3d 657 (10th Cir. 1996), the court reached the merits of an independent contractor's § 1981 claim for a hostile work environment. The court, however, granted summary judgment in favor of the defendant on the claim, without discussing whether such a claim was allowable. Id.

42 U.S.C. § 1981 provides that "[a]ll persons . . . shall have the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens . . . ." 42 U.S.C. § 1981(a). The phrase "make and enforce contracts" is defined to include the "making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." 42 U.S.C. § 1981(b) (emphasis added). Unlike Title VII which on its face concerns discrimination in employment relationships, the plain language of § 1981 indicates that the statute applies to "all persons," and courts have consistently applied § 1981 to independent contractors. See e.g., Miller v. Advanced Studies, Inc., 635 F. Supp. 1196, 1199 n.4 (plaintiff's claim under § 1981 is not affected by his status as an independent contractor); Wright,

911 F. Supp. at 1376; see also Springer v. Seaman, 821 F.2d 871 (1st Cir. 1987) (involving § 1981 suit brought by black independent contract postal carrier against Postal Service and other individuals). The Court remains persuaded that Plaintiff may bring a hostile work environment claim pursuant to § 1981, and denies Defendant's motion as it relates to this argument.

B. Plaintiff did not Adequately Plead a Hostile Work Environment Claim

Defendant next argues that because Plaintiff failed to allege that he was the victim of a hostile work environment in his Complaint, he was not entitled to proceed upon this theory. As with Defendant's first argument, the Court discussed and resolved this issue during the course of trial. The Court remains satisfied that Plaintiff has met his burden of notice pleading with respect to his civil rights claim. See DeNovellis v. Shalala, 124 F.3d 298, 310 n.6 (1st Cir. 1997) (plaintiff need not allege a hostile work environment in his complaint because notice pleading only requires that a plaintiff "give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests," not the "precise legal theories upon which the plaintiff bases his right to recovery") (citations omitted). In his Complaint, Plaintiff described Defendant's conduct and alleged a violation of Plaintiff's civil rights pursuant to § 1981. Plaintiff then articulated a hostile work environment theory before the Court in response to Defendant's Motion for Summary Judgment. See id. (hostile work environment satisfactorily presented to court where plaintiff failed to allege hostile work environment theory in complaint, but raised theory in reply brief to defendant's motion for summary judgment). The Court finds that Defendant had sufficient notice of Plaintiff's hostile work environment argument and, accordingly, denies Defendant's motion insofar as it alleges that Plaintiff failed to adequately plead this claim.

C. Evidence was Legally Insufficient to Support the Hostile Work Environment Verdict

Defendant's third argument is that the evidence introduced at trial was insufficient to support the jury's verdict in favor of Plaintiff on his hostile work environment claim. Whether Defendant's conduct was sufficiently pervasive to create a hostile or offensive work environment depends on the "gravity as well as the frequency of the offensive conduct." DeNovellis, 124 F.3d at 311 (analyzing Title VII hostile work environment claim). The Court is satisfied that based upon the evidence introduced at trial, including evidence that the racial graffiti allegedly remained on the parking lot for a period of several months, the jury's verdict was not against the weight of the evidence, nor would a reasonable factfinder be compelled to reach a different conclusion. Therefore, the Court denies Defendant's Motion for Judgment as a Matter of Law or, in the alternative, for a New Trial as it relates to Defendant's argument that the evidence was insufficient to support the jury's verdict.

D. Jury's Award of $650,000 is Inconsistent and Excessive

Defendant's fourth argument is that the jury's award of $650,000 to Plaintiff for violation of his civil rights is inconsistent with the remainder of the verdict and excessive. Defendant contends that the wording of Question #6 on the Special Verdict Form, requesting the jury's determination of damages on two of Plaintiff's breach of contract claims, resulted in an inconsistent verdict. Specifically, Defendant draws the Court's attention to the following language in Question #6:

> Subtract from this amount any portion of the damages you may have awarded in question #2 [civil rights damages] that is attributable to the violation of Plaintiff's civil rights as it relates to breach of contract. Do not subtract any damages you may have awarded in question #2 for pain, suffering, mental anguish, and other non-pecuniary damages, if any.

Because the jury awarded $4,440 in response to this question, Defendant contends that the $4,440 award is inconsistent with the $650,000 award on Plaintiff's hostile work environment claim which also included non-pecuniary damages. The Court is not persuaded by Defendant's interpretation of the jury's answers, and further rejects Defendant's argument that the $650,000 award could not have included any damages for emotional distress because the jury awarded no damages on Plaintiff's claim for negligent infliction of emotional distress. The Jury Instructions stated that any damages awarded for negligent infliction of emotional distress were to be "separate from and awarded in addition to, any award of mental anguish, pain or suffering." Jury Instructions at 16.

Moreover, Defendant failed to object to the wording of Question #6. By failing to object before the jury was dismissed, Defendant waived any claim of inconsistency unless "the alleged error seriously affected the fairness or integrity of the trial." Moore v. Murphy, 47 F.3d 8, 11 (1st Cir. 1995) (plain error doctrine reserved for use "in only the most egregious circumstances"); see also Wilson v. Maritime Overseas Corp., No. 97-1804, 1998 WL 374902, at *4 (1st Cir. July 10, 1998) ("[i]t is an ironclad rule in this circuit that failure to renew objections after the charge constitutes waiver of any claim of error.") (citations omitted). The Court is satisfied that any error in the wording of Question #6 does not rise to the level of plain error, and denies Defendant's motion insofar as it alleges that the jury's award of damages on Plaintiff's civil rights claim is inconsistent with the remainder of the verdict.

Defendant also argues that it should be entitled to a new trial because the jury's award of damages on Plaintiff's hostile work environment claim is excessive. While Defendant's initial Motion for Judgment as a Matter of Law and/or a New Trial did not contain a motion for

remittitur, on July 2, 1998, Defendant filed a Supplementary Memorandum of Law in Support of its Motion for New Trial or for Remittitur. Plaintiff responded to this Supplementary Memorandum on or about July 27, 1998.

Under the federal standard, "a damage determination will withstand scrutiny unless it is 'grossly excessive, inordinate, shocking to the conscience of the court, or so high that it would be a denial of justice to permit it to stand.'" Blinzler v. Marriott Int'l, Inc., 81 F.3d 1148, 1161 (1st Cir. 1996) (quoting Correa v. Hospital San Francisco, 69 F.3d 1184, 1197 (1st Cir. 1995)). The Court may grant a remittitur or a new trial when the award exceeds "any rational appraisal or estimate of the damages that could be based upon the evidence before it." Eastern Mount. Platform Tennis, Inc. v. Sherwin-Williams Co., 40 F.3d 492, 502 (1st Cir. 1994) (quoting Kolb v. Goldring, Inc., 694 F.2d 869, 872 (1st Cir. 1982)). In calculating a remittitur, the First Circuit applies the "least intrusive" standard. Conjugal Partnership v. Conjugal Partnership, 22 F.3d 391, 398 (1st Cir. 1994). "Under this standard, the remittitur amount should reduce the verdict 'only to the maximum that would be upheld by the trial court as not excessive.'" Id. (quoting Earl v. Bouchard Transp. Co., 917 F.2d 1320, 1328 (2d Cir. 1990)).

While the Court is extremely reluctant to disturb the jury's damages award, in light of all the evidence introduced at trial, the Court concludes that the compensatory damages awarded by the jury for violation of Plaintiff's civil rights are so excessive as to warrant a remittitur. Although the evidence at trial supported the jury's finding that Plaintiff was treated improperly and unlawfully, the Court is persuaded that the jury could not reasonably have awarded Plaintiff more than $300,000 on his hostile work environment claim given the evidence of compensatory damages presented by Plaintiff and the fact that Plaintiff's punitive damages claim was dismissed

during the course of trial. If Plaintiff accepts this reduced award, leaving him a total damages award of $304,440, the Court will deny Defendant's motion for a new trial.[1]

III. CONCLUSION

Defendant's Motion for Judgment as a Matter of Law or, in the alternative, for a New Trial is DENIED, except as to Defendant's claim that the jury's award of damages on Plaintiff's civil rights claim is excessive. Plaintiff shall have 30 days from the date of this Opinion in which to decide whether to accept remittitur to the amount stated above, or to proceed to a new trial.

SO ORDERED.

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MORTON A. BRODY
United States District Judge

Dated this 12th day of August, 1998.

[1] The Court does not consider this case to be one in which the verdict is the result of passion or prejudice so as to make remittitur improper. See 11 Charles Alan Wright, Arthur R. Miller, and Mary Kay Kane, Federal Practice and Procedure § 2815, at 165 (2d ed. 1995).